UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NOS.: 16-1800/16-1969

International Union of Operating Engineers, Local 18	§	
Petitioner/Cross-Respondent,	§	
v.	§	**PETITION FOR REHEARING EN BANC**
National Labor Relations Board	§	
Respondent/Cross-Petitioner.	§	

Now comes Petitioner/Cross-Respondent International Union of Operating Engineers, Local 18, by and through undersigned counsel, and hereby submits its Petition for Rehearing En Banc.

Respectfully Submitted,

/s/ *Jonah D. Grabelsky*
JONAH D. GRABELSKY, ESQ. (0089009)
TIMOTHY R. FADEL, ESQ. (0077531)
Fadel & Beyer, LLC
The Bridge Building
18500 Lake Road, Suite 120
Rocky River, Ohio 44116
jgrabelsky@fadelbeyer.com
tfadel@fadelbeyer.com
Counsel for Petitioner International Union of Operating Engineers, Local 18

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. STATEMENT OF WHY EN BANC REHEARING IS APPROPRIATE

Petitioner/Cross-Respondent International Union of Operating Engineers, Local 18 ("Local 18" or "Union") respectfully seeks a rehearing en banc of the opinion *Internatl. Union of Operating Engineers, Local 18 v. NLRB*, 6th Cir. No. 16-1800, 2017 U.S. App. LEXIS 21857, issued by a three-judge panel of this Court on October 31, 2017 in this matter ("Opinion"). The Opinion implicates questions of exceptional importance concerning the national policy of promoting labor peace through collective bargaining and arbitration, including the stability afforded by collective bargaining and the risk of unneeded litigation over the plain meaning of collective bargaining agreements.

II. LAW AND ARGUMENT

Fed. R. App. P. 35(a)(2) provides that an en banc hearing may be ordered if "the proceeding involves a question of exceptional importance." Under these circumstances, en banc review is appropriate because "[d]istrict judges, litigants, and subsequent panels need authoritative and non-conflicting guidance, and results should not depend upon the composition of the three-judge panel." *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 392 (6th Cir. 2017) (Griffin, J., dissenting). *See also United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) ("an *en banc* opinion gives us the opportunity to speak somewhat more broadly, for the purpose of giving

guidance to district courts in this Court and to future panels of this Circuit, than we normally do as individual panels").

The Opinion does not address questions of principle concerning the purpose of collective bargaining. This process is designed to establish a contractual relationship that is "governed by an agreed-upon rule of law" in order to avoid leaving matters "subject to a temporary resolution solely dependent upon the relative strength, at any given moment, of the contending forces." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). It has long been federal policy to promote industrial stabilization through the voluntary use of the collective bargaining process, and a "major factor in achieving industrial peace is . . . the arbitration of grievances[.]" *Id.* at 578. To be sure, contract provisions providing for arbitration of labor disputes "have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes, arising during the term of a collective-bargaining agreement." *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

Here, the Opinion affirmed the Board's conclusion that the enforcement of Local 18's collectively bargained work preservation clause is subject to a Board determination under Section 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D). 2017

U.S. App. LEXIS 21857 at *10. In so doing, the Opinion appears to be at odds with the "'national policy of promoting labor peace through strengthened collective bargaining.'" *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 413, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982), quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 95, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957). Similarly, while the Opinion noted that the enforcement of the work preservation clause "depends on the scope of the work its members have done in the past," 2017 U.S. App. LEXIS 21857 at *6, the Opinion still approved, without sufficient explanation, the Board's conclusion "that the [forklift and skid-steer] work" within the multiemployer bargaining unit "did not matter." *Id*. at *8.

At bottom, en banc review is required because ensuring labor stability and contractual rights to which labor unions, such as Local 18, are afforded under the Act is "worth the extra judicial time necessary to get . . . right." *Serpas v. Schmidt*, 827 F.2d 23, 40 (7th Cir. 1987) (Easterbrook, J., dissenting). Indeed, en banc review is necessary to "accomplish legitimate jurisprudential goals beyond decision in the individual case," such as "the resolution of novel and important issues of federal law[.]" *Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1416 (7th Cir. 1994) (Cummings, J., dissenting). Subordinating Local 18's work preservation claims to the adjudicatory machinery of the Board puts the integrity of contractual language preserving work on behalf of a union's members throughout the Sixth Circuit at risk.

That is, any employer may simply may avoid its contractual obligations in the context of a multiemployer bargaining unit by invoking the Board's jurisdiction. However, the protection of collective bargaining is primarily "strengthened by requiring adherence to the terms of labor contracts." *Internatl. Union of Operating Engineers, Local 542 v. Allied Erecting & Dismantling Co.*, 556 Fed. Appx. 109, 116 (3d Cir. 2014). The Opinion thereby underemphasizes the longstanding federal policy of promoting collective bargaining and arbitration to ensure labor stability.

III. CONCLUSION

For all the foregoing reasons, Local 18 respectfully requests that the Court grant its Petition for Rehearing En Banc.

Respectfully Submitted,

/s/ *Jonah D. Grabelsky*
JONAH D. GRABELSKY, ESQ. (0089009)
TIMOTHY R. FADEL, ESQ. (0077531)
Fadel & Beyer, LLC
The Bridge Building
18500 Lake Road, Suite 120
Rocky River, Ohio 44116
tfadel@wfblaw.com
jgrabelsky@wfblaw.com
Counsel for International Union of Operating Engineers, Local 18

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ *Jonah D. Grabelsky*
JONAH D. GRABELSKY (0089009)

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2017, a copy of the foregoing was electronically filed and served by operation of the Court's CM/ECF system to all parties indicated on the electronic filing receipt.

/s/ *Jonah D. Grabelsky*
JONAH D. GRABELSKY (0089009)